NO. 88-1164

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IN THE

Supreme Court of the United States

October Term, 1988

THE HONORABLE PAUL A. SIMMONS, United States District Judge for the Western District of Pennsylvania,

Pro Se Petitioner,

vs.

JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, and THE COMMITTEE OF UNSECURED CREDITORS OF JEANNETTE CORPORATION,

and

ROBERT J. CINDRICH, Esquire, MANSMANN CINDRICH & TITUS, DOUGLAS A. CAMPBELL, Esquire, and CAMPBELL & LEVINE,

and

SECURITY PACIFIC BUSINESS CREDIT, INC., THE COCA COLA BOTTLING COMPANY OF NEW YORK, INC., KNY DEVELOPMENT CORPORATION, J. CORP., JOHN P. BROGAN, JOHN J. BROGAN, HANLEY DAWSON, Jr., HANLEY DAWSON, III, JAMES A. McLEAN, JAMES R. WINOKER, ROBERT M. JANOWIAK, INTERDYNE, INC., MUENCH-KREUZER CANDLE COMPANY, CALVIN McCRACKEN and FRANK W. STOREY,

and

JEANNETTE CORPORATION t/a JEANNETTE GLASS, JOHN POLOJAC and AMERICAN FLINT GLASS WORKERS UNION OF NORTH AMERICA, LOCAL NO. 535,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented for Review

1. Did James Moody, Trustee of the Estate of Jeannette Corporation and the Committee of Unsecured Creditors of Jeannette Corporation and their Attorneys, Robert J. Cindrich, Esquire of Mansmann Cindrich & Titus, and Douglas A. Campbell, Esquire of Campbell & Levine have "legal standing" to act as Petitioners in this bankruptcy case to petition for and obtain a Writ of Mandamus from the United States Court of Appeals for the Third Circuit, directed to this United States District Judge requiring him to vacate a certain "conversion order" which this said District Judge had entered in the above-captioned bankruptcy case?

2. Assuming *arguendo* that the said Mandamus Petitioners in this case had legal "standing" to initiate this Mandamus action, should a Writ of Mandamus be issued on the facts of this case?

3. Is it proper for the Court of Appeals to issue a Writ of Mandamus where it is both legally and physically impossible for the Respondent, United States District Judge to carry out the directive set forth in the writ?

4. Should your Honorable United States Supreme Court in the sound exercise of your inherent supervisory powers over inferior Federal Courts, bar the Law Firm of Mansmann, Cindrich & Titus (headed by Jerome Mansmann) from practicing bankruptcy law in the United States Bankruptcy Courts and bankruptcy law in the United States District Court of the Third Judicial Circuit of the United States for the reason that the Honorable Carol L. Mansmann, the wife of Jerome Mansmann, and as a Judge of the United States Court of Appeals for the Third Circuit, sits on the Court which appoints all Bankruptcy Judges sitting in said Third Judicial Circuit to 14 year terms of office?

The Parties

The *Pro Se* Petitioner for a Writ of Certiorari in this case, United States District Judge, Paul A. Simmons, seeks to have your Honorable Supreme Court review the judgment of the United States Court of Appeals for the Third Circuit, which judgment caused the issuance of a Writ of Mandamus directed to this Petitioning United States District Judge, Paul A. Simmons, directing and requiring him to vacate a certain "conversion order" that this District Judge had entered in this bankruptcy case on March 15, 1988. (See General Appendix Pages 1a and 22a, Documents A and C).

Because of the unusual complications in this case involving the alleged "lack of standing" of all of the Petitioners for the Writ of Mandamus in the Circuit Court in this case, a more complete explanation of each party's interest in this matter is very necessary in order to properly understand it. There are over 2000 Unsecured Creditors who are the real parties interested in the outcome of this case and who are not listed in the caption of this case, and a clear majority of said Unsecured Creditors are on record as officially opposing the action of the United States Court of Appeals in issuing a Writ of Mandamus against this Certiorari Petitioning District Judge. (See General Appendix page 181a, Document L.)

The parties set forth in the caption of the Writ of Mandamus (See General Appendix page 1a, Document A) that were heard by the United States Court of Appeals for the Third Circuit are also the parties who are set forth in the caption of this within Petition for a Writ of Certiorari and are more particularly described as follows:

1. The first group of listed parties in the Circuit Court below is James Moody, Chapter Eleven Trustee of the Bankrupt Estate of Jeannette Corporation who

petitioned the United States Court of Appeals for the issuance of a Writ of Mandamus and a Writ of Prohibition directed against this within Certiorari Petitioning District Judge, requesting among other matters that this District Judge be required to vacate his said "conversion order" dated March 15, 1988. (See General Appendix page 22a, Document C.) The Trustee's principal interest in this case was that he was acting as one of the plaintiffs in a suit to set aside a fraudulent conveyance filed on behalf of the bankrupt estate against the group of defendant-parties listed below in paragraph six, of the "Parties" section of this petition for a Writ of Certiorari. It is contended in this Petition for a Writ of Certiorari that said Trustee had no "standing" to have Petitioned for a Writ of Mandamus against this District Judge in the Circuit Court below.

2. The second group of listed parties in the Circuit Court below is the Committee of Unsecured Creditors of Jeannette Corporation, whose Committee members are all from a group of 882 Unsecured Trade Creditors (as distinguished from 1145 Unsecured Employee Creditors) and who also petitioned the United States Court of Appeals for the issuance of a Writ of Mandamus and a Writ of Prohibition directed against this within Certiorari Petitioning District Judge, requesting among other matters that this District Judge be required to vacate his "conversion order", dated March 15, 1988. It will be contended as an issue in this Petition for a Writ of Certiorari that said Creditors Committee had "no legal standing" to be a party plaintiff in the "fraudulent conveyance" case and that said Creditors Committee had "no standing" to be a petitioner in the Mandamus case.

3. The third group of listed parties in the Circuit Court below, are Robert Cindrich, Esquire, and the Law Firm of Mansmann, Cindrich & Titus, who are attorneys for the above-mentioned Committee of Unsecured Creditors in the action filed in the United States District

Court for the Western District of Pennsylvania on behalf of the bankrupt estate wherein it is alleged among other matters that a fraudulent conveyance should be set aside. Said attorneys have alleged in the bankrupt proceedings that they have personal financial interests in the potential recovery in said "fraudulent conveyance" litigation of 36 million dollars by virtue of a 33% contingent attorney fee interest in the proceeds of said litigation which allegedly will give said attorneys an interest in potential attorney fees up to 12 million dollars. It will be contended as an issue in this Petition for a Writ of Certiorari, that said Firm of Attorneys, Mansmann, Cindrich & Titus have no "legal standing" to be petitioners in the Mandamus case where said attorneys are acting contrary to the wishes of a majority of their unsecured creditor clients.

4. The fourth group of listed parties in the Circuit Court below, are Douglas A. Campbell, Esquire and the Law Firm of Campbell & Levine, who are attorneys for both the Trustee and the Committee of Unsecured Creditors of Jeannette Corporation as hereinbefore mentioned. Both the Trustee and the Committee of Unsecured Creditors have filed an action to set aside a "fraudulent conveyance" under the same circumstances as described for Attorneys Mansmann, Cindrich & Titus in paragraph 3 above, and in fact, the Firms of Mansmann, Cindrich & Titus and Campbell & Levine are co-counsel to the "fraudulent conveyance litigation", and both firms of attorneys admit to personal financial interests in the potential recovery of 36 million dollars by virtue of the hereinbefore-referred to 33% contingent attorney fee interest in the said proceeds of said litigation which allegedly will give the Mansmann, Cindrich & Titus and Campbell & Levine Firm a joint interest in a potential attorney fee of up to 12 million dollars. (See Appendix pages 71a-73a at page 338 of Document D.) It will be contended as an Issue in this Petition for a Writ of Certiorari that said Firm of

Attorneys, Campbell & Levine, have "no legal standing" to be petitioners in the Mandamus case where said attorneys are acting contrary to the wishes of a majority of their unsecured creditor clients.

5. The fifth group of listed parties in the Circuit Court below and the within Petition for the Writ of Certiorari is the United States District Judge, Paul A. Simmons, who was the Respondent in the Mandamus action below and who was directed by the United States Court of Appeals to vacate his "conversion order" of March 15, 1988. Contrary to the caption of the Mandamus action in the United States Court of Appeals, Judge Simmons is *not* a Nominal Respondent because as will be discussed later in greater detail, this Judge has been ordered to vacate his "conversion order" when it was at all relevant times legally and physically impossible for him to do so because on March 30, 1988, almost six months prior to the issuance of the Writ of Mandamus on September 26, 1988, this District Judge recused himself from said bankruptcy case, which case was immediately reassigned to another Judge. In order to avoid the serious consequences of being placed in contempt of Court, this District Judge is herein petitioning for this Writ of Certiorari.

6. The following group of listed parties in the Circuit Court below are also defendants in the "fraudulent conveyance litigation", and these defendants are not Unsecured Creditors of the bankrupt and they have no direct legal interest of any kind in the "conversion order" issued by this District Judge. These parties have no "legal standing" to participate in the Certiorari proceeding now before your Honorable Supreme Court since they are not at all involved in the administration of the bankrupt's estate. The Fraudulent Conveyance Litigation Defendants are: Security Pacific Business Credit, Inc., The Coca Cola Bottling Company of New York, Inc., KNY Development Corporation, J. Corp., John P. Brogan, John J. Brogan, Hanley Dawson, Jr.,

Hanley Dawson, III, M. Janowiak, Interdyne, Inc., Muench-Dreuzer Candle Company, Calvin McCracken and Frank W. Storey.

7. The seventh listed group of parties in the Circuit Court below are:

A. Jeannette Corporation, t/a Jeannette Glass, debtor in the reorganization proceeding under Chapter 11 of the Bankruptcy Code and debtor in the dissolution proceeding under Chapter 7 of the Bankruptcy Code.

B. John Polojac and American Flint Glass Workers Union of North America, Local No. 535. Mr. Polojac and the Union represent real parties in interest namely 732 active employees of the debtor and 206 retirees of the debtor for a total of 938. (There are 207 unrepresented employee-retirees, and there is a total of 1145 active and retired employees who are unsecured creditors. The 938 employee-retiree claims, represented by the Union which are a majority of all of the outstanding unsecured claims, opposed the Court of Appeals granting the Writ of Mandamus against this District Judge and they filed an Answer to the Petition for a Writ of Mandamus with the Clerk of the United States Court of Appeals for the Third Circuit. (See General Appendix page 181a, Document L.)

In fact, *all* of the classes of Unsecured Creditors, who are the real parties in interest in this matter are also represented by attorneys other than Campbell & Levine and Mansmann, Cindrich & Titus in matters involving the administration of the bankrupt estate. 1145 active and retired employees who are Unsecured Creditors of the bankrupt with potential claims exceeding over sixteen million dollars are represented by Attorney Philip Beard; the 882 Unsecured Trade Creditors with claims exceeding four million dollars are represented by Attorney David Humphreys; the Pension Benefit Guaranty Corporation (PBGC) with claims exceeding seven million dollars are represented by Attorney Angie

Arnett, and the "Calvin D. McCracken" claim exceeding twenty-nine million dollars is represented by Attorney Grace Harris.

These above-referred to classes of Unsecured Creditors have conflicting legal and financial interests and there is no proper and ethical way (as noted in this District Court's Opinion, See General Appendix pages 104a to 140a, Document D at pages 352 to 366, inclusive), for Attorneys Campbell & Levine and Mansmann, Cindrich & Titus to represent the conflicting legal and financial interests of these different classes of Unsecured Creditors in this Appellate action now before your Honorable Supreme Court. Further, Mansmann, Cindrich & Titus had authority to prosecute only the "fraudulent conveyance litigation" and they have no authority of any kind whatsoever to represent any of the classes of Unsecured Creditors on the issue of converting the bankruptcy proceeding from Chapter 11 to Chapter 7, in the District Court and said attorneys presently have no authority of any kind whatsoever to represent any of the Unsecured Creditors in this certiorari matter now before your Honorable Supreme Court. (See General Appendix page 143a, Document E; page 149a, Document F; page 156a, Document G; and page 160a, Document H.) Not one party has appealed this District Judge's "conversion order".

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IN THE

Supreme Court of the United States

October Term, 1988

No._____

THE HONORABLE PAUL A. SIMMONS, United States District Judge for the Western District of Pennsylvania,

Pro Se Petitioner,

vs.

JAMES MOODY, Trustee of the Estate of JEANNETTE CORPORATION, and THE COMMITTEE OF UNSECURED CREDITORS OF JEANNETTE CORPORATION,

and

ROBERT J. CINDRICH, Esquire, MANSMANN CINDRICH & TITUS, DOUGLAS A. CAMPBELL, Esquire, and CAMPBELL & LEVINE,

and

SECURITY PACIFIC BUSINESS CREDIT, INC., THE COCA COLA BOTTLING COMPANY OF NEW YORK, INC., KNY DEVELOPMENT CORPORATION, J. CORP., JOHN P. BROGAN, JOHN J. BROGAN, HANLEY DAWSON, JR., HANLEY DAWSON, III, JAMES A. McLEAN, JAMES R. WINOKER, ROBERT M. JANOWIAK, INTERDYNE, INC., MUENCH-KREUZER CANDLE COMPANY, CALVIN McCRACKEN and FRANK W. STOREY,

and

JEANNETTE CORPORATION t/a JEANNETTE GLASS, JOHN POLOJAC and AMERICAN FLINT GLASS WORKERS UNION OF NORTH AMERICA, LOCAL NO. 535,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Statement of Jurisdiction

District Court Jurisdiction

This civil matter now before your Honorable Supreme Court for review involves the Bankrupt Estate of Jeannette Corporation. This Bankruptcy matter which involved a motion to convert the bankrupt's estate from Chapter Eleven of the United States Bankruptcy Code to Chapter Seven of the United States Bankruptcy Code is governed by the provisions of the Bankruptcy Act of 1978. (The new Act of July 10, 1984, 98 Stat. 333.)

The relevant sections of the new Bankruptcy Act applicable to this case are:

Title 11 U.S.C. Section 1112—Conversion or Dismissal. (See Statute Appendix II Exhibit No. 1, page 223a.)

Title 11 U.S.C. Section 327, Employment of Professional Persons. (See Statute Appendix II Exhibit No. 3, page 226a.)

Title 11 U.S.C. Section 348—Effect of Conversion. (See Statute Appendix II Exhibit No. 2, page 225a.)

The Motion to Convert the underlying bankruptcy proceeding in the above-captioned case from Chapter 11 to Chapter 7, was filed by John Polojac and the American Flint Glass Workers Union of North America, Local No. 535 (hereinafter called "Union"), in the United States Bankruptcy Court for the Western District of Pennsylvania, at Bankruptcy Case No. 82-3265, and Bankruptcy Motion No. 87-531 (See General Appendix page 169a, Document I), and the motion was withdrawn to the United States District Court for the Western District of Pennsylvania by order of this District Court Judge, dated March 10, 1987. (See United States District Court, Civil Action No. 83-2383, at Doc. Entry No. 385.) This Chapter 11 case was originally filed on October 4, 1982, as a Chapter 7 case and was converted to a Chapter 11 case by order of the Bankruptcy Court, December 10, 1982. (See Bankruptcy Docket Entry Nos. 1 and 23.)

By an order of this District Court Judge (Certiorari Petitioner herein) dated March 15, 1988 (Hereinafter referred to as the "conversion order"), this bankruptcy case (Jeannette Corporation) was converted from a Chapter 11 case to a Chapter 7 case. (See General Appendix page 22a, Document C for the "conversion order".) [(Also see General Appendix page 29a, Document D, beginning at page 321 *et seq.* of Document D), for the Findings of Fact, Conclusions of Law and Order as printed in 85 B.R. 319 (W.D. Pa. 1988).]

Jurisdiction in this case was properly in the United States District Court for the Western District of Pennsylvania pursuant to 28 U.S.C. Section 1331, which reads, "The District Court shall have original jurisdiction of all civil actions arising under the Constitution, *laws* or treaties of the United States."

See also *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed. 2d, 598 (1982).

Court of Appeals Jurisdiction

Jurisdiction was properly in the Court of Appeals for the Third Circuit in regard to entertaining the Petitions for a Writ of Mandamus and Writ of Prohibition of James Moody, Trustee; The Committee of Unsecured Creditors of Jeannette Corporation, Robert J. Cindrich, Esquire; Mansmann, Cindrich & Titus; Douglas A. Campbell, Esquire and Campbell & Levine (See General Appendix page 1a and page 4a, Documents A and B), addressed to this Certiorari Petitioning District Judge and requesting said Third Circuit Court to direct this Certiorari Petitioning District Judge to vacate the aforementioned "conversion order" and the District Court's supporting "findings of fact", is authorized by Title 28 U.S.C. Section 1651. (For text See Statute Appendix II Exhibit No. 9, page 230a) and the Federal Rules of Appellate Procedure Rule 21—Writs of Mandamus and Prohibition directed to a Judge or Judges, etc. (For text of Rule 21, See Statute Appendix II Exhibit No. 10, page 231a.)

The Circuit Panel in the aforementioned Mandamus Action was of the belief that the threshold question before it was whether this Certiorari Petitioning District Judge's Bankruptcy Court Orders that were entered after this District Judge announced his intention to recuse himself from the above-captioned bankruptcy case at some time in the future, must be set aside pursuant to 28 U.S.C. Section 455(a). (See Statute Appendix II Exhibit No. 4, page 227a. See also Title 28 U.S.C. Section 144, Statute Appendix II Exhibit No. 5, page 227a.)

There is no doubt that the United States Court of Appeals had the proper jurisdiction to address the legal and factual issues that arose out of its judicial construction of 28 U.S.C. 455(a). See *Liljeberg v. Health Services,* 486 US _____, 100 L.Ed. 2d 855, 108 S. Ct. 2194 (1988).

The United States Court of Appeals for the Third Circuit on September 26, 1988, issued a Writ of Mandamus (supported by a reported Opinion (See Copy of Opinion, General Appendix page 4a, Document B)), addressed to this Certiorari Petitioning District Judge directing him to vacate his "conversion order" and also to vacate the "supporting findings for said conversion order". (See General Appendix page 1a, Document A, for Writ of Mandamus). On October 20, 1988, a Petition for Rehearing *en Banc* was denied. (See General Appendix page 220a, Document N.)

Supreme Court of the United States Jurisdiction

This Certiorari Petitioning United States District Judge in filing this Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to allow your Honorable Supreme Court to review the legal propriety of said Writ of Mandamus issued against this District Judge is invoking Title 28 U.S.C. Section 1254(1), which reads (See Statute Appendix II Exhibit No. 7, page 230a):

> "1254. Courts of appeals; certiorari; appeal certified questions

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of *any* party to *any civil* or criminal case, before or after rendition of judgment or decree."

Your Certiorari Petitioning United States District Judge, Paul A. Simmons, is personally a legally interested named party involved in the Mandamus action sought to be reviewed by your Honorable Supreme Court and this District Judge is not in any way a nominal respondent for the following reasons:

(a) 28 U.S.C. Section 1254(1), grants "*any party* to *any civil case*" the unfettered right to file a Petition for a Writ of Certiorari to your Honorable Supreme Court and your Certiorari Petitioning United States District Judge is in fact a named Respondent Party against whom the Writ of Mandamus of the Third Circuit Court of Appeals is directed.

(b) Your Certiorari Petitioning United States District Judge, Paul A. Simmons herein (for a number of legal reasons which will be discussed in detail in the body of this Petition for a Writ of Certiorari) is requesting your Honorable Supreme Court to review and reverse an order of the United States Court of Appeals for the Third Circuit wherein a Writ of Mandamus (See General Appendix page 1a, Document A for a copy of said Writ of Mandamus) was issued by said Circuit Court, directing this Certiorari Petitioning District Judge to vacate a certain bankruptcy "conversion order" dated March 15, 1988. (See General Appendix page 22a, Document C for a copy of said conversion order.)

One of the assigned reasons for requesting a reversal of the Circuit Court is that it is legally and physically impossible for this Certiorari Petitioning District Judge to obey and carry out the directives of said Writ of Mandamus, because on March 30, 1988, almost six months prior to the issuance of said Writ of Mandamus dated September 26, 1988, this Certiorari Petitioning

District Judge had recused himself from said case, which case was immediately reassigned to another District Judge.

In order to avoid the serious consequences of being placed in an impossible dilemma of being held personally in contempt of the Circuit Court and with no legal way of purging said contempt, it is clear that this Certiorari Petitioning District Judge has a clearly personal, legally protected interest in appealing the unlawful Writ of Mandamus Order via a Petition for a Writ of Certiorari in order to avoid a possible citation for contempt of the Circuit Court.

(c) Although this Certiorari Petitioning District Judge might be considered to be an "Officer of the United States" within the meaning of Title 28 U.S.C. Sections 516, 517, 518 and 519 (See Statute Appendix II Exhibit Nos. 6(a), 6(b), 6(c) and 6(d), pages 228a, 229a) thereby reserving to the United States Department of Justice, the right to conduct this requested review of the action of the Circuit Court in issuing a Writ of Mandamus against this Certiorari Petitioning District Judge, it is clear that the Department of Justice has no justiciable interest in this within Petition for a Writ of Certiorari for the following reasons:

1. Because this Certiorari Petitioning District Judge is actually a named party in this case and is a party who has a real and definite personal legal interest in the outcome of this case, this Certiorari Petitioning District Judge clearly is included in the language "any party" in Title 28 U.S.C. Section 1254(1) and therefore this District Judge has an absolute and unconditional right to Petition your Honorable Supreme Court for a Writ of Certiorari in this case. (For the statutory language of 28 U.S.C. Section 1254(1) See Statute Appendix II Exhibit No. 7, page 230a.)

2. Because this Certiorari Petitioning District Judge is absolutely entitled, as a named party, to petition for a Writ of Certiorari, pursuant to 28 U.S.C.

Section 1254(1), this within Petition for a Writ of Certiorari now before your Honorable Supreme Court is specifically excluded from the language and applicability of Title 28 U.S.C. Sections 516, 517, 518 and 519 (See Statute Appendix II Exhibit Nos. 6(a), 6(b), 6(c) and 6(d), pages 228a, 229a) by the expressed prefatory language in Sections 516 and 519, "Except as otherwise authorized by law, . . .".

3. The United States is not a party to this within Certiorari proceeding, and has no interest in this proceeding and is not, has not and will not be engaged in securing evidence in regard to this matter.

4. Further, this Certiorari proceeding pending now before your Honorable Supreme Court was not initiated to vindicate the judicial power of the United States under Article III of the United States Constitution as was the case in *United States v. Providence Journal Co.*, 485 US _____, 99 L.Ed. 2d 785, 108 S.Ct. 1502 (decided May 2, 1988), where a Special Prosecutor who by definition is "of counsel" to the United States and represents the public interest and where alleged criminal conduct was involved and where the special prosecutor was actively pursuing a contempt action to vindicate the power of the Federal Government to deal with criminal matters. (See also *Barry v. United States,* 528 F.2d 1094, 1099 (7th Cir. 1976).) This Certiorari case now before your Honorable Supreme Court is a civil matter wherein as of this time, there has been no attempt to enforce the provisions of the Writ of Mandamus issued against this Certiorari Petitioning Judge by contempt proceedings or otherwise because of this pending Petition for a Writ of Certiorari.

5. Further, in the case of *United States vs. Providence Journal,* cited *supra,* the special prosecutor who himself was *not* a party to the case, sought authorization from the United States Solicitor General to file a petition in the United States Supreme Court for a Writ of Certiorari. The Solicitor General denied the requested authorization, so the Special Prosecutor on his own initiative filed a Petition for a Writ of Certiorari,

briefed and argued said Providence Journal case (cited *supra*) for and on behalf of the United States Government and specifically in the name of the United States Government with the United States Government actually as a named party, without the authorization of the Attorney General. In this Certiorari case now pending before your Honorable Supreme Court, the primary issue involves the interpretation of the law of judicial disqualification in a private civil bankruptcy matter. Legal matters pertaining to judicial disqualification in specific civil legal cases such as are involved in this Certiorari case now before your Honorable Supreme Court, are matters peculiarly and exclusively within the inherent power of the your Honorable Supreme Court to control the conduct of its inferior Judges and is not a matter that is of general legal interest to the Attorney General in the Executive Branch of the Government.

6. In the case of *Liljeberg v. Health Services*, 486 US _____, 100 L.Ed. 2d 855, 108 S.Ct. 2194, which was decided June 17, 1988, about one month *after* the Providence Journal case (cited *supra*) your Honorable Supreme Court addressed the Fifth Circuit's construction of the law pertaining to the disqualification of Federal Judges pursuant to 28 U.S.C. 455(a), which is the identical subject now being presented to your Honorable Supreme Court for review by virtue of this Certiorari Petitioning District Judge, and your Honorable Supreme Court granted certiorari and decided said issue in said *Liljeberg* case without any intervention of any kind by the United States Department of Justice.

7. In summary, it is clear in light of *Liljeberg v. Health Services, Inc.*, cited *supra*, that your Honorable Supreme Court has the inherent supervisory power and unfettered jurisdiction to address the Third Circuit's construction of 28 U.S.C. Section 455(a) as said statute pertains to the disqualification of this Certiorari petitioning District Judge on the facts of the within civil case.

Statement of the Case

This is the first case in recorded legal history where an Appellate Court (Third Circuit Court of Appeals) has issued a writ of mandamus which has the direct and actual legal effect of placing the imprimatur of approval on the advancement of the personal financial interests of the Mandamus Petitioning Committee of Unsecured Creditors, the Mandamus Petitioning Trustee and the Mandamus Petitioning Attorneys in the above captioned case to the legal detriment and legal disadvantage of the majority of the unsecured creditors, who are the real parties in interest that said Committee, Trustee and Attorneys have a legal duty to properly represent. (See discussion on Ethical issues, General Appendix page 104a to page 140a; Document D, *i.e.*, pages 352 to 366 inclusive of Document D.)

The true and undisputed facts up to and including January 29, 1988, are that the Trustee, James Moody, was appointed trustee on July 27, 1983, and at paragraph 12 of said order, both trustee and the Committee of Unsecured Creditors were simultaneously given the right to engage counsel and pursue the "fraudulent conveyance litigation" where it is stated (General Appendix page 147a, paragraph 12 of Document E), the following:

> "12. That the Application of the Committee of Unsecured Creditors to engage co-counsel and have a standing to sue are hereby approved; and that a confirming order shall be entered upon presentation of same by the Committee of Unsecured Creditors and/or its counsel. The trustee is deemed to have joined in the application to engage co-counsel, and shall join the Committee of Unsecured Creditors as co-plaintiff in the actions contemplated in the application for standing to sue."

On the next day, July 28, 1983, strange actions on the part of the Bankruptcy Judge occurred.

1. The Bankruptcy Judge signed an Order (7-28-83) without a cost-benefit hearing (General Appendix page 160a, Document H), permitting the Committee of Unsecured Creditors to engage the law Firms of Campbell & Levine, and Mansmann, Cindrich & Huber to pursue the "fraudulent conveyance litigation: on a 33% contingent fee basis. This order, without a time-stamp, was filed with the Clerk on July 29, 1983.

2. The Bankruptcy Judge on the same day, signed a second order (7-28-83) (General Appendix page 156a, Document G), without a "cost benefit hearing", granting the Committee of Unsecured Creditors the right to sue in regard to the "fraudulent conveyance litigation". This order, without a time-stamp, was filed with the Clerk on July 29, 1983.

3. The Bankruptcy Judge on the same day, signed a third order (7-28-83) (General Appendix page 149a, Document F), without a "cost benefit hearing", granting the trustee the same right to engage Campbell & Levine only as counsel, (Mr. Cindrich, etc. was omitted) only for the purpose of allowing the trustee to pursue the same "fraudulent conveyance litigation" referred to immediately above in Documents G and H. Paragraph 2 of Document F, General Appendix page 150a, in relevant part states:

> "2b To appear for, prosecute, defend and represent applicant's interest in suits arising in or related to this case."

Petitioners in the Mandamus action at page 10 of their final submission, freely confess that: "Since that time, (July 28, 1983) Campbell and Levine has represented the Creditors' Committee only in the capacity of special litigation counsel, (along with the firm of Mansmann, Cindrich & Titus in connection with the District Court action, "fraudulent conveyance litigation").

The Bankruptcy Judge knew that it was legally wrong and improper to grant the application of the Committee of Unsecured Creditors to engage Mansmann, Cindrich & Huber (Titus) co-counsel on 33% contingency basis with Standing to Sue as a co-plaintiff in the "fraudulent conveyance" case, and that all three of these orders dated July 28, 1983 are and were void *ab initio* and of no legal force or effect, since the Trustee alone at that time as of July 27, 1983 (Document E, General Appendix page 143a), was the only party with proper standing to bring suit to void the alleged "fraudulent conveyance."

The late Bankruptcy Judge who signed these orders of July 27, 1983 and July 28, 1983, knew full well that a Creditor's Committee is allowed to initiate legal proceedings *only* when the Trustee or Debtor in possession unjustifiably fails to bring a necessary law suit and/or has abused its discretion in not suing to avoid a preferential transfer, because this very Bankruptcy Judge who signed these three orders of July 28, 1983 as above noted, had so ruled in the case of *In re: Monsour Medical Center,* 5 Bankry. 715, 718 (Bankry, W.D. Pa. 1980). In fact, the *Monsour* case was cited with approval on the same point of law (*In re: STN Enterprises,* 779 F.2d 901, 904 (2d Cir. 1985) when the Court of Appeals for the Second Circuit held unequivocally that the Creditor Committees are allowed to initiate legal proceedings *only* when the Trustee or Debtor in possession unjustifiably fails to bring suit or abused its discretion in not suing to avoid a preferential transfer.

Every recorded case on the subject has held that the Trustee-Plaintiff in bankruptcy matters such as the "fraudulent conveyance litigation" involved in this case does not need the additional and superfluous assistance of another plaintiff such as the Committee of Unsecured Creditors to prosecute such "fraudulent conveyance litigation" for the reason that such Creditors' Committee is unnecessary and has no standing to join in and

participate in said litigation where a Trustee has been appointed as in this case, and where said Trustee is in fact prosecuting said litigation. However, the Trustee Moody and his attorneys Campbell and Levine are removed from the bankruptcy case and the "fraudulent conveyance litigation" automatically when the bankruptcy case is converted from Chapter 11 to Chapter 7, of the Bankruptcy Code by virtue of Title 11, USC Section 348(e). (See Statute Appendix II Exhibit No. 2, page 225a.) A new Trustee would be appointed in the Chapter 7 proceeding, but the Committee of Unsecured Creditors would be eliminated altogether.

It is uncontested that if the "conversion order" were *not* vacated, the present plaintiffs in the "fraudulent conveyance litigation", namely Moody, the Trustee, and the Committee of Unsecured Creditors and their respective attorneys would be removed from this bankruptcy case and the "fraudulent conveyance litigation" by operation of law.

The motive of the above described four groups of Mandamus Petitioners to have this Certiorari Petitioning District Judge's "Conversion Order" vacated in the Circuit Court below via a Writ of Mandamus, is obvious. If said "Conversion Order" is *not* vacated and if Moody is not reappointed as the new Chapter 7 Trustee, Moody and all of the above described attorneys will lose potential accounting, Trustee and attorney fees in excess of twelve million dollars.

To allow said Mandamus Petitioners to succeed in collaterally attacking this Certiorari Petitioning District Judge's "Conversion Order" under the guise of an alleged judicial disqualification and against the wishes of a majority of the unsecured creditors who petitioned for the "conversion order" and who are the real parties in interest, amounts to condoning an abuse of the legal process and is a perversion of justice.

It is admitted by all interested parties that the debtor's operations were completely shut down shortly after the conversion of the case from the Chapter 7 on December 10, 1982 to Chapter 11; and said glass business has not operated since. All of the debtor's land, building, machinery, equipment, and all other assets that would be required to operate its former glass manufacturing business were sold in September of 1983. As of October 31, 1986, all of the debtor's assets were converted to cash with the exception of a cause of action which the Trustee has filed against Security Pacific Business Credit, Inc., *et al.*, in the United States District Court, C. A. No. 83-2382 (the above-captioned case), alleging a "fraudulent conveyance." Since October 31, 1986, the only activity in this bankruptcy case has been the pursuit of that "fraudulent conveyance" cause of action.

On February 2, 1987, John Polojac and the American Flint Glass Workers of North America, Local No. 535, on behalf of 1145 active and retired employee Unsecured Creditors of the Bankrupt moved the Bankruptcy Court to reconvert the bankruptcy proceeding from Chapter Eleven to Chapter Seven. (See General Appendix page 169a, Document I.) On March 10, 1987, this Certiorari Petitioning Judge entered an Order withdrawing the reference from the Bankruptcy Court. On January 6, 1988, the Trustee filed a formal Motion requesting this District Judge to extend the "bar date" in lieu of converting the proceeding from Chapter Eleven to Chapter Seven. (See General Appendix page 172a, Document J.) This Motion by the Trustee was filed despite the objections of a majority of the Unsecured Creditors and the Trustee obviously had a serious conflict of interest when he filed said motion to extend said "bar date", against the declared financial interests of the majority of the Unsecured Creditors that said Trustee agreed under oath to represent.

Title 11, U.S.C. Section 1112(b) of the Bankruptcy Code, addresses this "conversion issue". See 11 U.S.C. 1112(b) of the United States Bankruptcy Code which outlines what elements a party in interest must establish in order to convert a Chapter 11 Reorganization into a Chapter 7 Liquidation. (See Statute Appendix II Exhibit No. 1, page 223a.)

This District Judge set January 29, 1988, as the time to hear arguments on said "conversion motion" and at that time all of the classes of Unsecured Creditors who are the real parties in interest in this matter were and are represented by attorneys other than Mandamus Petitioning Attorneys, Campbell & Levine and Mansmann, Cindrich & Huber (Titus), and this District Judge is advised and believes that none of these other attorneys (listed above in "Parties"), were informed of and/or consented on behalf of their clients to the filing of this Petition for a Writ of Mandamus with the United States Court of Appeals against this District Judge.

In an obvious effort to prevent this District Judge from ruling on the "conversion issue" the Trustee's attorney sent a letter to this District Judge several days prior to the January 29, 1988, hearing date, suggesting that this Judge may have a conflict of interest in the case because this Judge's daughter worked for Mellon Bank, one of Debtor's Jeannette's Corporation's 882 Unsecured *Trade* Creditors. After nearly five years on this very complex case, this was the first notice that this District Judge received that Mellon Bank had an interest in this case.

The Circuit Panel Statement (Page 9 of Slip Opinion, General Appendix page 12a, Document B), that "*the (District) Judge reiterated his position that recusal was necessary in order to avoid the appearance of impropriety*", had reference to the need for recusal in the future, not for the need for recusal at the present time. This District Judge clearly stated that recusal would be

necessary in the future and only after the "conversion" matter had been addressed. The "conversion order" entered by this District Court was not at all in Mellon Bank's interest and there was absolutely no appearance of impropriety when said conversion order was entered.

At page 5 to 8, inclusive, of the hearing transcript of January 29, 1988, this District Judge said the following among other statements:

> *"I think that after about three or four years, and hours and hours of work on this matter, I think it would be a sacrifice of much judicial effort and would be contrary to the whole idea of judicial economy if I were not to address the main problems here today, which, as I say, don't and won't . . . I can guarantee you, there is no impact in any way on the financial interest of Mellon, one way or other, as I view it".*

Further, this District Judge recalls some mention of the fact that some lawyers before him were also defending a law suit in which this District Judge was a party.

This District Judge clearly felt and expressed on the record that none of these matters were of sufficient substance to warrant an instant recusal. As to legal issues that could be raised in the future, perhaps this District Judge's impartiality could be reasonably questioned, but not as of January 29, 1988.

Mellon as an "Unsecured Trade Creditor" was represented at the January 29, 1988, hearing by David Humphrey and the lawyers who were involved in a case in which this Judge was a party, apparently were also present in the Courtroom. (This District Judge was never advised as to the identity of said attorneys.) If any of these affected parties and/or attorneys were in doubt about this District Judge's impartiality, they had over forty-five days prior to the date of the "conversion order" of March 15, 1988 (General Appendix page

22a, Document C), to move for this Judge's recusal pursuant to 28 U.S.C. Section 455. *No recusal motion was ever filed in this case, up to this very time,* and looking back as a matter of fact in hindsight, every party, directly affected by the "conversion order" including the Petitioners in the Mandamus matter, agree that this District Judge was not guilty of abusing his discretion and no party has suggested that this District Judge acted in an impartial, arbitrary or capricious manner in entering the "conversion order" in this District Court.

This Certiorari Petitioning United States District Judge entered the "conversion order" (See General Appendix page 22a, Document C) along with Findings of Fact, Conclusions of Law and Opinion in support of said "conversion order". (See General Appendix page 26a, Document D.)

The Mandamus Petitioners (See Section on "parties" *supra*) filed a Petition for Mandamus and Writ of Prohibition against this District Judge requesting that the Circuit Court direct this Judge to vacate his findings, opinion and "conversion order". (See record in the Circuit Court below.)

The Mandamus Petitioners filed a second Petition to modify the first Petition. (See record in the Circuit Court below.)

This District Judge answered both of said Petitions. (See record in the Circuit Court below and General Appendix page 176a, Document K.)

This District Judge at the direction of the Court of Appeals filed a second Answer to said Petition for Mandamus. (See General Appendix page 176a, Document K.)

John Polojac and the American Flint Glass Workers Union of North America, Local No. 535, who represented a majority of all of the "Unsecured Creditors", filed an

Answer opposing the issuance of said Writ of Mandamus. (See General Appendix page 181a, Document L.)

Security Pacific Business Credit, Inc., who was not an Unsecured Creditor and who was a defendant in the "fraudulent conveyance" case and who had at most a "tangential" interest in the "conversion order", filed an Answer to said Mandamus Petition. (See Record in the Circuit Court below.)

The Third Circuit Court of Appeals granted the request for a Writ of Mandamus (even though a motion for the recusal of this District Judge was never filed) on the ground that once this District Court said that his impartiality could reasonably be questioned,[1] that this Judge should have recused at that time and that this Judge was not empowered to perform judicial functions thereafter pursuant to Title 28 U.S.C., Section 455(a). (See Statute Appendix II Exhibit No. 4, page 227a; See General Appendix pages 1a and 4a, Documents A and B.)

This Certiorari Petitioning District Judge filed a Petition for Rehearing *En Banc* before the United States Court of Appeals for the Third Circuit with accompanying Appendix, which was refused on October 20, 1988. (See General Appendix page 220a, Document N.)

This Certiorari Petitioning District Judge is herein now Petitioning your Honorable Supreme Court to review the action of the Court of Appeals of the Third Circuit in issuing said Writ of Mandamus against this District Judge.

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[1] This District Court was clearly referring to the future and not to the time of entry of the "conversion order" and this District Judge considered himself to be disqualified only as to matters that would be decided after March 30, 1988.

REASONS FOR GRANTING THE WRIT

Discussion of the First Question Presented

It is submitted that not one of the Mandamus Petitioners in the Circuit Court had "standing" to petition for and obtain a Writ of Mandamus against this Certiorari Petitioning District Judge requiring him to vacate his bankruptcy "conversion order" that he had entered in this case.[2]

Although the Circuit Panel was formally requested to directly address this "standing" question on three different occasions,[3] it declined to do so. (See General Appendix page 176a, Document K.) However by a clear and unmistakable implication, the Circuit Panel has erroneously held that all of said Mandamus Petitioners had "standing" in said action to petition for a Writ of Mandamus.

As to the "standing" of the Committee of Unsecured Creditors, the cases of *In the Matter of Monsour Medical Center, et al.*, 5 BR 715 (1980) W.Dist. of Pa; *In Re STN Enterprises*, 779 F.2d 901, 904 (2nd Cir. 1985); *Matter of Xonics Photo Chemical, Inc.*, 841 F.2d 198, 202 (7th Cir. 1988), hold that where a trustee has been appointed to conduct bankruptcy fraudulent conveyance litigation, (See General Appendix page 147a, Document E, paragraph 12 and General Appendix page 150a, Document F, paragraph 2b), and enters in upon the conduct of said litigation, the Bankruptcy Court appointment of a Committee of Unsecured Creditors and their attorneys to aid the Trustee in said litigation is of no legal effect. Because the Appointment of the Committee of Unsecured Creditors and their attorneys is

[2] The question of "standing", *i.e.* whether a litigant is entitled to have the Court decide the merits of the dispute is fundamental to the matter of Federal Jurisdiction. (See generally the Federal Court and the Federal System Third Ed. 1988, at page 110, by Hart & Wechsler).

[3] The "standing" question was specifically raised in this Certiorari Petitioning Judge's First Answer, Second Answer, and the Petition for Rehearing *en Banc*.

in legal effect void *ab initio,* said Committee of Unsecured Creditors and their Attorneys Mansmann, Cindrich & Huber and Campbell & Levine have no "standing" to participate in this bankruptcy case in any way whatsoever, including the Mandamus action.

The Trustee Moody and his Attorneys, Campbell & Levine cannot properly intervene or have "standing" to litigate the conversion of the bankruptcy case to Chapter 7 because: "The Trustee appointed in a corporate reorganization proceeding is not concerned with the merits of a Petition for reorganization or its dismissal, and hence is not entitled to appeal from a decree of dismissal." (See *Loomis v. Gila County,* 101 F.2d 827, 103 F.2d 312; petition for rehearing denied. (9th Cir.).

To resolve this clear conflict on the law of Bankruptcy in the Second, Seventh and Ninth Circuits with the Third Circuit, the Writ of Certiorari should issue in this case.

Even if it is assumed *arguendo* that the Committee of Unsecured Creditors was a proper party in the "fraudulent conveyance litigation", said Committee and the Trustee still would have no "standing" to collaterally attack this District Judge's "conversion order" via a Petition in Mandamus. The Committee of Unsecured Creditors and the Trustee are duty bound to represent the interests of all the Unsecured Creditors impartially. In this case, 1145 employee Unsecured Creditors are in favor of this District Judge's Order of Conversion, and 882 of the Unsecured Creditors are opposed to said "conversion order". It is impossible for the Committee of Unsecured Creditors and the Trustee to represent these conflicting interests impartially, fairly and properly. In this case, the Committee of Unsecured Creditors and the Trustee are, through a Mandamus action, favoring all of the Unsecured trade creditors at the economic expense of the unsecured employee creditors. It is noteworthy to point out that all of the members of the Unsecured Creditor Committee are "trade creditors" and the "employee creditors" are not represented on said committee.

At the District Court level, the Union on behalf of the interested employee Unsecured Creditors moved to convert the Bankruptcy Chapter 11 case to Chapter 7. (See General Appendix Page 169a, Document I.) The Trustee opposed the Union's motion by moving the District Court to extend the bar date in lieu of conversion. (See General Appendix Page 172a, Document J.) The practical effect of the Writ of Mandamus which directs this Court to vacate the "conversion order" is to protect the financial interests of the trade creditors, and the Trustee's fees and their attorneys' potential twelve million dollar legal fee at the expense of the majority of the creditors, namely the employee unsecured creditors.

The Third Circuit in an Opinion filed on November 23, 1988, and since the Opinion filed in this case at bar on September 26, 1988, now holds (contrary to the holding in the within case), that where two groups of interested parties have conflicting interests in the outcome of pending litigation, the District Court must deny "*Jus Tertii* standing" to any one Plaintiff or entity who wishes to simultaneously represent all of the conflicting interests of the group under those circumstances. In the case at bar, 882 unsecured trade creditors are opposed to the "conversion order", while a majority 1145 unsecured employee creditors support this District Court and are in favor of said "conversion order". Under these circumstances, the within Mandamus Petitioners would have no lawful "*Jus Tertii* standing" to purport to represent all of the "unsecured creditors and to move for said "conversion order" to be vacated at the expense of the majority of said unsecured creditors who are in favor of "conversion". See *Polaroid Corporation v. Disney, et al.*, (unreported Third Circuit slip opinion dated 11-23-88). For relevant excerpts (See General Appendix Page 207a, Document M, which in legal effect reverses this Circuit decision in the case at bar.) Judge Becker wrote the opinions in both cases.

The Third Circuit has already reversed the law in the case at bar, in less than six weeks and has so far departed from customary judicial practices, that a review of its actions on this "standing" issue by Writ of Certiorari should be granted.

As noted earlier in this Petition, the only real interest that the Mandamus Petitioners have in this case is to protect their potential professional fees in excess of twelve million dollars. In this case, the Mandamus Petitioning Attorneys have openly admitted to having a vested personal financial interest in this bankruptcy case, and they have freely admitted that this District Court Judge did not abuse his discretion when he entered the "conversion order".

The Bankruptcy Code is clear at Title 11 U.S.C. Section 327 (See Statute Appendix II Exhibit No. 3, page 226a) and the applicable case law is clear that if said Mandamus Petitioner Attorneys claim a beneficial interest of any kind in the bankrupt's estate, they must be dismissed as attorneys in the bankruptcy case and they are completely disqualified from advancing their special financial interest as Mandamus Petitioners while employed by the bankrupt estate. These Mandamus Petitioner Attorneys are also prevented from having "standing" to file said Mandamus Petition by the Pennsylvania Code of Professional Responsibility then in effect at the time of filing the Mandamus Petition on March 29, 1988 (a new Code of Professional Responsibility went into effect on April 1, 1988). (See ethical discussion at page 352 *et seq.* of Document D beginning at General Appendix Page 104a.)

Again it is respectfully submitted that the Third Circuit Court of Appeals in this case has so far departed from the accepted and usual course of judicial proceeding that there is a pressing need for your Honorable Supreme Court to exercise its power of supervision over said Circuit Court by granting the Writ.

Discussion of the Second Question Presented

Assuming *arguendo* that the said Mandamus Petitioners in this case had legal "standing" to initiate this Mandamus action, should a Writ of Mandamus have been issued on the facts of this case?

It is submitted that contrary to the decision of the Third Circuit Court of Appeals, the proper answer to this second question presented is clearly "NO". The Third Circuit's legal position as to every facet of this issue is in conflict with almost every other Circuit and in fact, is in conflict with its own decisions rendered as recently as this year (1988).

Contrary to the statement on page 4 of the Third Circuit Panel Opinion in this case (See General Appendix page 7a, Document B), the Mandamus Petition in this case is clearly a surrogate for an appeal and accomplishes exactly the same end as would be the case if a successful appeal had been taken.

If an appeal of this District Court's "Conversion Order" had been successfully accomplished, this bankruptcy case would have remained in Chapter 11, exactly as before and the Mandamus Petitioners will remain as participants in the fraudulent conveyance litigation.

The Writ of Mandamus should not have issued in this case because Mandamus may not serve as a substitute for an appeal and Mandamus is an extraordinary remedy available only when the Petitioner proves that the District Court has manifestly abused its discretion or usurped judicial power. See *F/S Airlease, Inc. v. Simon, et al.*, 844 F.2d 99, 103, 104 (3rd Cir. 1988), where an appeal in the circumstances of the case at bar was available under Third Circuit law.

Since an appeal of this Court's "Conversion Order" was readily available to all interested parties in the case at bar, the remedy of Mandamus is unavailable in this case. See *Brown vs. U.S.A., et al.,* 851 F.2d 615, 620 (3rd Cir. 1988).

This District Judge admittedly did not abuse his discretion by converting this case to Chapter 7, and this Petition for Mandamus should be dismissed. In fact, the Honorable Circuit Panel in this case (found at page 18, of the slip opinion) when referring to said "conversion order", said ". . . the motion to convert is uncontested. . .". (See General Appendix page 21a, Document B at page 18.)

This District Judge clearly felt and expressed on the record in clear, unmistakable language that none of these matters (*i.e.* "Mellon Matter" and/or the "Lawyer Matter"), were of such sufficient substance to warrant an instant recusal on the facts of this case.

Mellon as an "Unsecured Trade Creditor" was represented at the January 29, 1988, hearing by David Humphrey and the lawyers who were involved in a case in which this Judge was a party, apparently were also present in the courtroom. (This District Judge was never advised as to the identity of said attorneys.) If any of these affected parties and/or attorneys were in doubt about this District Judge's impartiality, they had over forty-five days prior to the date of the "Conversion Order" of March 15, 1988 (See General Appendix page 22a, Document C), to move for this Judge's recusal pursuant to 28 U.S.C. Sec. 144 and/or 455. (See Statute Appendix II Exhibits 4 and 5, page 227a.) *NO* recusal motion was ever filed in this case and looking back as a matter of fact in hindsight, every party, directly affected by the "conversion order", (including the Petitioners in the Mandamus matter), agree that this District Judge was not guilty of abusing his discretion and no unsecured creditor of any class has suggested that this

District Judge acted in an impartial, arbitrary or capricious manner in entering the "conversion order" in this case. At most, even assuming *arguendo* that this District Judge should have recused himself, his failure to do so clearly is harmless error.

The action of the Third Circuit Court in issuing this Writ of Mandamus against this Certiorari Petitioning Judge, in a case where a recusal motion was never filed, where there was no abuse of judicial discretion and where at most there was harmless error, is in direct conflict with *United States v. Murphy,* 768 F.2d 1518, 1541, *cert. denied,* 475 U.S. 1012; 106 S. Ct. 1188, 89 L.Ed. 2d 304 (1986), (7th Cir. 1985), where it was held:

> "If an defendant wants a judge to stand aside under Sec. 455(a), *he must make the appropriate motion, judicial acts taken before the motion may not later be set aside unless the litigant shows actual impropriety or actual prejudice; appearance of impropriety is not enough to poison the prior acts.* See *Margoles v. Johns,* 660 F.2d 291 (7th Cir. 1981) cert denied, 455 U.S. 909, 192 S. Ct. 1256, 71 L.Ed 2d 447 (1982) (appearance of impropriety, and perhaps even actual impropriety, may not be raised for the first time on collateral attack); *Barry v. United States,* 528 F. 2d 1094, 1100 (7th Cir.) *cert. denied,* 429 U.S. 826, 97 S.Ct. 81, 50 L.Ed. 2d 88 (1976) (when the trial is "impeccably fair and just" an erroneous failure to recuse is harmless error)".

The bona fides of this Mandamus Petition is clearly brought into question since as aforestated, even Mandamus Petitioners Campbell and Cindrich freely admit that this District Judge did not abuse his discretion by converting the bankruptcy case to Chapter 7, and the Honorable Circuit Panel has found that ". . . no one is challenging the substance of the conversion order, and the motion to convert is uncontested . . .". (See General Appendix pages 4a and 21a, Document B at pages 1 and 18.)

The action of the Third Circuit Court of Appeals in directing this Certiorari Petitioning District Judge to vacate the "Conversion Order" where at most there was admittedly only harmless error, is in direct conflict with and contrary to the most recent pronouncement of your Honorable Supreme Court on the subject of disqualification of Judges pursuant to Title 28 U.S.C. Section 455(a), where it was said in the very recent 1988 case of *Liljeberg v. Health Services Corp.*, (486 US _____ at _____, 100 L.Ed. 2d 855, at 873, 108 S.Ct. 2194 at 2203, 1988):

> "A conclusion that a statutory violation occurred does not, however end our inquiry. As in other areas of the law, there is surely room for harmless error committed by busy Judges who inadvertently overlook a disqualifying circumstances. There need not be a draconian remedy for every violation of Section 455(a)."
>
> See also *Barry v. United States,* 528 F.2d 1094, 110 (7th Cir. 1976), where it was held that a Judge would not be disqualified under Section 455, where there was harmless error.

In light of this serious conflict as to the interpretation of Section 455(a) between the Third Circuit and your Honorable Supreme Court, as to the treatment of "harmless error", the Petition for a Writ of Certiorari in this case should be allowed.

Discussion of the Third Question Presented

Is it proper for the Court of Appeals to issue a Writ of Mandamus where it is both legally and physically impossible for the Respondent, United States District Judge, to carry out the directives set forth in the Writ?

It is submitted that contrary to the decision of the Third Circuit Court of Appeals, it is not legally proper to issue this Writ of Mandamus (See General Appendix Page 1a, Document A) against this Certiorari

Petitioning United States District Judge as Respondent, directing said Judge to vacate certain findings and orders entered in this case, where it is impossible for him to carry out the direction of the Writ.

It is physically and legally impossible for this Judge to carry out the directive of the Writ to vacate certain orders and findings in this case, because on March 30, 1988, almost six months *prior* to the issuance of the Writ of Mandamus on September 26, 1988, this District Judge recused himself from said bankruptcy case, which case was immediately reassigned to another District Judge. In this District Court (The Western District of Pennsylvania) where there is an individual calendar system, only one District Judge has jurisdiction of any one case at any one time.

Once a Judge has recused himself, he cannot affect the determination of any case from which he is barred. As was pointed out in *Arnold v. Eastern Airlines, Inc.*, 712 F.2d 899, 904 (4th Cir. 1983):

> "There is a ready explanation, Judge Ervin is regular and active, and as a general proposition is in service. However, should he, or any other regular, active member of the court, recuse or disqualify himself at any time, he is out of service insofar as that particular case is concerned. *To disqualify means to debar legally.* See Webster's New International Dictionary, 2d ed., p. 753. *That is synonymous with lack of legal capacity, i.e., with inability to serve.* Hence, Judge Ervin properly did not sit during the en banc rehearing, because, for the particular case, he was not one of the circuit judges in regular active service."

This action of the Third Circuit in directing this Judge to do that which is legally and physically impossible and subjecting him to a possible contempt citation, is clearly contrary to the law of the Fourth Circuit (the Arnold case cited *supra*) and this conflict between the two Circuits certainly should be reviewed and reconciled by your Honorable Supreme Court.

Discussion of the Fourth Question Presented

This District Court Judge has said before and will now say again that it is ethically improper for the Law Firm of Mansmann, Cindrich and Huber (Titus) to practice in the Bankruptcy Courts of the Third Circuit and/or for them to address bankruptcy matters in the District Courts in the Third Circuit and/or the Court of Appeals for the Third Circuit such as in the case at bar.

At the time the Law Firm of Mansmann, Cindrich and Huber (Titus) was illegally appointed on July 28, 1983, to act as attorney for the Committee of Unsecured Creditors on a 33% contingent fee basis to pursue the "fraudulent conveyance" litigation contrary to case law and without the advice, knowledge and/or consent of at least the great majority of the real parties in interest and without a noticed and scheduled "cost-benefit" hearing, as is required by law, Judge Carol L. Mansmann, (the wife of Jerome Mansmann, senior partner in the Firm of Mansmann, Cindrich and Huber (Titus)), was a United States District Judge in the Western District of Pennsylvania, having been appointed by President Reagan, effective March 19, 1982.

At the time of the Bankruptcy Court Order of July 28, 1983, Judge Mansmann was a member of the Board of United States District Judges who had the power to appoint United States Bankruptcy Judges to their position of authority in the Western District of Pennsylvania.

Although this Judge, Paul A. Simmons, presumes that all Judges act lawfully and properly, the legal system must avoid even the appearance of impropriety. In this instance, one might reasonably infer (and presume even though wrongfully) that the late Bankruptcy Judge Gibson was at least thinking about the relationship of Judge Mansmann, (who was then on the appointing authority for Bankruptcy Judges), with her husband's

law firm, when he, Judge Gibson, knowingly and improperly appointed said Firm of Mansmann, Cindrich and Huber (Titus) to represent the "Unsecured Creditors' Committee" in the "fraudulent conveyance" litigation on a 33% contingency basis with a potential legal fee of twelve million dollars.

On April 4, 1985, Judge Mansmann was appointed to the United States Court of Appeals for the Third Circuit where she now serves. In the meantime, on July 10, 1984, the bankruptcy law was amended to make the Judges of the United States Court of Appeals the appointing authority for Bankruptcy Judges. It does not take a genius to infer that a Judge in the Bankruptcy Court who wants to be reappointed to said Bankruptcy Court might (even unconsciously) tend to favor her husband's law firm in contested bankruptcy matters before said Judge in Bankruptcy Court. In any event, it is clear that there is an appearance of impropriety under the above recited circumstances for Attorney Jerome Mansmann's Firm to practice before Bankruptcy Judges who may feel beholden to his wife in order to obtain reappointment to said Bankruptcy Court.

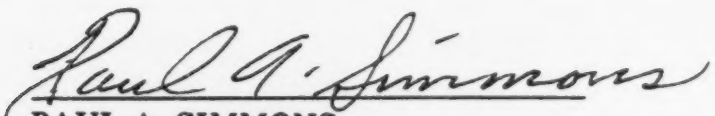
It was suggested to this Judge that some "authority" has written an opinion which permitted the Mansmann Firm to practice in the Bankruptcy Court, under these circumstances, but a copy of such opinion has never been produced.

In any event, the Judges of the Honorable Third Circuit Court of Appeals should also have considered disqualifying themselves in this case because of their colleague's, Judge Mansmann's, direct financial involvement in this case, suggested by her husband's law firm's admitted vested interest in a potential twelve million dollar legal fee; and in an event of a "remand", it is respectfully suggested that the Supreme Court of the United States should appoint three Circuit Judges from another Court of Appeals to consider this case in order to avoid the appearance of impropriety.

Conclusion

WHEREFORE, for all of the reasons enumerated herein and for the reason that the United States Court of Appeals for the Third Circuit has rendered many decisions on many very important legal matters in this case that clearly and directly conflict with decisions of other Courts of Appeals on the same important legal matters and in some instances, the Third Circuit decision on legal questions in this case conflicts with decisions of your Honorable Supreme Court, and because the Third Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings so as to call for the exercise of your Honorable Supreme Court's power of supervision, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



PAUL A. SIMMONS
United States District Judge